

89-738

No. —

Supreme Court, U.S.

FILED

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JOSEPH L. SPANIOLO, JR.

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AGIPCOAL USA, INC.,

Petitioner,

v.

INTERNATIONAL UNION, UNITED MINE
WORKERS OF AMERICA; DISTRICT 30,
UNITED MINE WORKERS OF AMERICA;
LOCAL UNION NO. 1827, UNITED
MINE WORKERS OF AMERICA,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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QUESTIONS PRESENTED

1. Whether the Court's decision in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), required the court of appeals to reverse the district court's vacation of an arbitrator's award, which ignored the collective bargaining agreement's clear and unambiguous ten day time limitation on the filing of grievances and imported a continuing violation concept which reads the limitation provision out of the agreement?
2. Whether the court of appeals' decision is, like the arbitrator's award itself, contrary to national labor policy?
3. Whether the court of appeals' decision is in conflict with the decisions of other courts of appeals and with other decisions of the Sixth Circuit itself?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner, Agipcoal USA, Inc., and the respondents, International Union, United Mine Workers of America, District 30, United Mine Workers of America, and Local Union No. 1827, United Mine Workers of America. Agipcoal USA, Inc. is the wholly owned subsidiary of Agipcoal S.p.A., an Italian company owned by Ente Nazionale Idrocarburi, the Italian State Agency for Hydrocarbons. Agipcoal USA, Inc. has no subsidiaries and no affiliates other than companies which are wholly owned by Agipcoal S.p.A. and which are not publicly owned or traded.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

No. ____

AGIPCOAL USA, INC.,

Petitioner,

v.

INTERNATIONAL UNION, UNITED MINE
WORKERS OF AMERICA; DISTRICT 30,
UNITED MINE WORKERS OF AMERICA;
LOCAL UNION NO. 1827, UNITED
MINE WORKERS OF AMERICA,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Petitioner, Agipcoal USA, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on June 21, 1989. Rehearing with a suggestion of rehearing *en banc* was denied on August 9, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unpublished and is reprinted in the Appendix (App. at 1a). The court of appeals'

denial of rehearing is reprinted in the Appendix (App. at 45a). Petitioner was originally granted judgment by the United States District Court for the Eastern District of Kentucky at Pikeville, which affirmed the report and recommendation of the United States Magistrate. The Appendix contains the unpublished decision of the district court (App. at 5a) and the report and recommendation of the magistrate (App. at 8a). The award of the arbitrator under review is also set forth in the Appendix (App. at 16a).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered an opinion and judgment on June 21, 1989, reversing the district court's decision (App. at 1a). The petitioner timely filed a petition for rehearing with a suggestion for rehearing *en banc* which was denied by the court of appeals on August 9, 1989 (App. at 45a). The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case arises under Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), which provides:

§ 185. Suits By and Against Labor Organizations.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United

States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioner, Agipcoal USA, Inc. ("Agipcoal"), is engaged in the preparation and sale of bituminous coal. At all times material to this case it was signatory to the National Bituminous Coal Wage Agreement of 1984 ("1984 NBCWA") with Respondents ("Union").

Agipcoal owns the Pevler Complex which consists of approximately 13,000 acres of coal lands. Agipcoal operates a coal preparation plant on the Pevler Complex. The bargaining unit of Agipcoal's employees at the plant is represented by the Union.

Over the years, coal mines on the Pevler Complex have been developed primarily through the use of independent mining contractors. These contractors operate at the Pevler Complex pursuant to standard mining agreements entered into with Agipcoal. The standard mining agreements of Agipcoal neither require nor prohibit independent contractors from recognizing any union as the collective bargaining representative of the employees of the contractors.

On May 6, 1986, Agipcoal entered into its standard mining agreement with KTK Mining and Construction Company ("KTK"). On July 1, 1986, Agipcoal entered into its standard mining agreement with Highwire, Inc. ("Highwire"). Pursuant to their respective agreements with Agipcoal, KTK and Highwire commenced mining operations at the Pevler Complex.

The Union immediately became aware of Agipcoal's contracts with KTK and Highwire. In fact, the Union engaged in discussions with KTK and Highwire in July and August, 1986, about entering into labor agreements with the Union. In addition, the Union met with Agipcoal in July and August, 1986, in an effort to persuade Agipcoal to assist the Union in obtaining labor agreements with KTK and Highwire. Agipcoal, however, was unwilling to interfere in the labor relations of KTK and Highwire, or otherwise force these companies to recognize the Union as the representative of their employees, since to do so would not only be contrary to its mining contracts, but also a violation of the legal rights of the employees of the contractors.

When Highwire and KTK refused to accede to the Union's demands, and Agipcoal refused to interfere with the labor relations of its contractors, members of the Union engaged in picketing at the Pevler Complex in August and again in October, 1986. This picketing was in protest over KTK's and Highwire's refusal to recognize or execute labor agreements with the UMWA. The Union failed in its attempts, through picketing, to force KTK and Highwire to recognize the Union and sign a labor agreement with it.

The Union filed a grievance against Agipcoal on December 22, 1986, alleging that the contracts with KTK and Highwire violated various provisions of the 1984 NBCWA. This grievance was filed over four months after the Union's initial picketing in August, two months after the second picketing episode in October, and six months after KTK and Highwire commenced operations at the Pevler Complex.

At all steps of the grievance procedure, Agipcoal challenged the timeliness of the grievance under Article XXIII(d) of the 1984 NBCWA, which states:

Any grievance which is not filed by the aggrieved party within ten (10) working days of the time when the employee reasonably should have known it, shall be denied as untimely and not processed further.

The grievance was referred to arbitration pursuant to Article XXIII of the 1984 NBCWA and a hearing on the matter was held before an arbitrator on May 12, 1987.

In his award, the arbitrator found that the "grievance at issue here was filed well beyond the ten working day time frame established by Article XXIII, Section (d) of the National Agreement . . ." (App. at 30a). Despite this finding, the arbitrator went on to hold that because Agipcoal's mining contracts with KTK and Highwire continued to be in effect in December, 1986, ". . . the Union's failure to grieve at the time the contract violation commenced cannot be said to estop it from challenging that ongoing violation in the future" (App. at 31a). Consequently, the arbitrator refused to dismiss the grievance as untimely, and went on to grant the grievance on its merits.

Agipcoal filed an action in the United States District Court for the Eastern District of Kentucky, pursuant to Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), seeking to overturn the arbitrator's award on the basis that, *inter alia*, the arbitrator had ignored the plain language of the ten day limitation period of Article XXIII(d) of the

1984 NBCWA. Upon consideration of this issue, the United States Magistrate agreed that the arbitrator had ignored the plain language of the ten day limitation period and that, therefore, the award did not draw its essence from the collective bargaining agreement and should be vacated. The district court affirmed the magistrate's decision, holding that the award did not draw its essence from the 1984 NBCWA because the arbitrator had ignored the plain language of the agreement and had dispensed his own brand of industrial justice.

On appeal, the court of appeals recognized, as had the arbitrator, that the Union was aware of Agip-coal's mining contracts with KTK and Highwire in July and August, 1986, long before the grievance was filed in December. Nevertheless, despite the fact that the arbitrator may have committed "serious error", the court of appeals held that because the arbitrator arguably construed the ten day limitation period, in conjunction with a continuing violation theory, it was required to reverse the district court under this Court's decision in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS INCONSISTENT WITH SUPREME COURT PRECEDENT WHICH MANDATES THAT ARBITRATION AWARDS WHICH IGNORE THE PLAIN LANGUAGE OF THE COLLECTIVE BARGAINING AGREEMENT DO NOT DRAW THEIR ESSENCE FROM THE AGREEMENT.

In *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), the Court articulated the standard to be applied by federal

courts when reviewing labor arbitration awards. In that case, the Court stated:

The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.

* * *

Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

363 U.S. at 596-97.

The Court has consistently reaffirmed and applied this standard of review of labor arbitration awards. Thus, in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), the Court reiterated that, although courts are not free to set aside an arbitration award simply because they would have interpreted the collective bargaining agreement differently, an arbitration award is legitimate only so long as it "draws its essence from the collective bargaining agreement" and is not merely "[the arbitrator's] own brand of industrial justice." 484 U.S. at

36, citing *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. at 596. In so holding, the Court specifically stated that an arbitrator "may not ignore the plain language of the contract" when interpreting a collective bargaining agreement. 484 U.S. at 38. Accord, e.g., *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 54 (1974) (arbitrator's source of authority is collective bargaining agreement and award is legitimate only if it draws its essence from the bargaining agreement).

In the instant case the arbitrator found that the grievance was filed well beyond the ten day time limitation period set forth in Article XXIII(d) of the 1984 NBCWA. Nevertheless, the arbitrator determined that the grievance was timely by construing the ten day limitation period in conjunction with a "continuing violation" theory found nowhere in the 1984 NBCWA. As was recognized by the district court, this interpretation is not allowed because it ignores the plain language of the collective bargaining agreement. Consequently, under well established Supreme Court precedent, the district court vacated the award.

There can be no argument in this case that the arbitration award should be upheld because the arbitrator was "arguably construing" the language of Article XXIII(d). The ten day time limitation contained in the 1984 NBCWA is simply not subject to any varying construction. The language is clear and unambiguous in its requirement that an aggrieved party must file a grievance within the ten day time frame or the grievance will be lost. The effect of the arbitrator's failure to apply the plain language of Article XXIII(d) was to read the ten day time limitation

virtually out of the contract and, in effect, rewrite the parties' collective bargaining agreement to suit his own notions of industrial justice.

II. THE DECISION BELOW IS CONTRARY TO THE WELL ESTABLISHED FEDERAL LABOR POLICY WHICH FAVORS THE RAPID RESOLUTION OF LABOR DISPUTES.

The Court has consistently recognized that:

The unmistakable policy of Congress stated in Section 203(d), 29 U.S.C. §173(d), is: "final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

Buffalo Forge Company v. United Steelworkers of America, 428 U.S. 397, 412-13 (1976). Accord, e.g., *Gateway Coal Company v. United Mine Workers of America*, 414 U.S. 368, 377 (1974); *Schneider Moving and Storage Co. v. Robins*, 466 U.S. 364, 371-372 (1984); *NLRB v. Acme Industrial Company*, 385 U.S. 432, 438-439 (1967). The Court further recognizes that an important element of national labor policy is the rapid resolution of labor disputes. See, e.g., *G.P. Reed v. United Transportation Union*, ___ U.S. ___, 109 S.Ct. 621, 628-29 (1989); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 169 (1983).

The action of the court of appeals, in allowing the arbitration award to stand despite the fact that the arbitrator ignored the express time limitation provision of the parties' labor agreement, is contrary to well established national labor policy. It rewards the Union's delay while it sought to resolve the dispute

through legally questionable means and strikes, rather than requiring the Union to proceed in a timely manner to initiate the grievance and arbitration procedures. It may also result in employers being discouraged from agreeing to arbitrate disputes in the future, since there can be no assurance that contractually mandated limitations provisions on the filing of grievances will be enforced, or that the Union will not be allowed to pursue grievances months, and even years, after the alleged violations have occurred.¹

The ill effects of the court of appeals' ruling are particularly pronounced with respect to grievances filed over an employer's contracts with third parties such as KTK and Highwire. Long after a contract is negotiated and signed, equipment purchased or leased, government permits obtained and regulatory requirements complied with, and myriad other attendant business and personal matters finalized, the Union may leap out of the woodwork, claim a "continuing violation" of a collective bargaining agreement that may have long since expired, and (as the arbitrator

¹ The effects of the failure to apply the ten day limitation period may be felt long after the collective bargaining agreement has expired. Under the arbitrator's view, contracts entered during the term of the 1984 NBCWA may constitute violations which continue indefinitely. In the absence of any contractual limitations period, grievances over such contracting would be arbitrable indefinitely. See *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 255 (1977) (duty to arbitrate grievances which arose during term of collective bargaining agreement survives expiration of that agreement unless negated expressly or by clear implication). Moreover, the 1988 NBCWA, which took effect on February 1, 1988, and covers hundreds of coal industry employers, contains an identical ten day limitation provision.

and the court of appeals did below) upset those settled relationships. Multiply this by the hundreds of contractors and thousands of employees potentially affected in the coal industry alone, and it is clear that the court of appeals' decision cannot be allowed to stand.

III. THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS AND THE SIXTH CIRCUIT'S OWN PRIOR DECISIONS REGARDING THE STANDARD OF REVIEW OF ARBITRATION AWARDS.

The overwhelming weight of authority from other circuits is that an arbitration award which ignores or is contrary to the plain language of the collective bargaining agreement must be vacated. *S.D. Warren Co. v. United Paperworkers' International Union, Local 1069*, 815 F.2d 178, 182-83 (1st Cir. 1987); *Washington Hospital Center v. Service Employees International Union Local 722*, 746 F.2d 1503, 1515 (D.C. Cir. 1984); *Teamsters Local Union 657 v. Stanley Structures, Inc.*, 735 F.2d 903, 905 (5th Cir. 1984); *Monongahela Power Company v. Local 2332, IBEW*, 566 F.2d 1196, 1199 (4th Cir. 1976).

Moreover, the Sixth Circuit's own precedent mandates that arbitration awards which disregard the plain language of the collective bargaining agreement cannot be enforced. As it stated in *Detroit Coil Company v. Int'l Association of Machinists & Aerospace Workers, Lodge 82*, 594 F.2d 575 (6th Cir. 1979):

Thus, while an arbitrator has considerable latitude, his powers are not unlimited in the resolution of labor disputes. The arbitrator is confined to the interpretation and application of the collective bargaining agreement, and

although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions.

594 F.2d at 579. This standard of review of arbitration cases has, with the exception of the instant case, been repeatedly reiterated by the court of appeals, as evidenced by its very recent decision in *International Brotherhood of Electrical Workers, Local 429 v. Toshiba America, Inc.*, 879 F.2d 208 (6th Cir. 1989).

Yet, inexplicably, in the instant case the court of appeals radically departed from this well established precedent when it failed to vacate an award which is contrary to the plain language of the 1984 NBCWA. As a result, we are left with a decision which is in conflict not only with the decisions of this Court and other circuits, but with other Sixth Circuit decisions as well.

CONCLUSION

The decision of the court of appeals below is inconsistent with this Court's decisions, is contrary to national labor policy, and is in conflict with the other precedents of both the Sixth Circuit and other circuits. For this reason, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX



UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 88-6122

AGIPCOAL USA, INC.

Plaintiff-Appellant,

v.

INTERNATIONAL UNION, UMWA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed

FILED

JUN 21 1989

LEONARD GREEN, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations.
Please see Rule 24 before citing in a proceeding in a court
in the Sixth Circuit. If cited, a copy must be served on
other parties and the Court.

This notice is to be prominently displayed if this decision
is reproduced.

BEFORE: NELSON and BOGGS, Circuit judges, and ALDRICH,
District Judge.*

PER CURIAM. The underlying issue in this appeal from
a district court's refusal to enforce a labor arbitration award

* The Honorable Ann Aldrich, United States District Judge for the
Northern District of Ohio, sitting by designation.

is whether a grievance was timely filed. The arbitrator ruled that it was; the district court disagreed and vacated the arbitrator's decision. Mindful of the Supreme Court's admonition in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), that the lower federal courts should accord the utmost deference to arbitral decisions in labor disputes, we shall reverse the judgment of the district court.

In 1982 Agipcoal USA, Inc. (then known as Enoxy Coal) purchased a group of coal properties known as the Pevler Complex. In working these properties, Agipcoal used both its own coal miners and miners employed by independent contractors. In October of 1984 the company shut down all mining operations at the Pevler Complex and laid off the Agipcoal employees who had been working there. In May and July of 1986, however, Agipcoal entered into lease agreements with independent contractors for the mining of the Pevler properties. The contractors were contractually bound to deliver the coal mined to Agipcoal, which in turn used the coal to meet its own sales commitments.

The United Mine Workers union became aware of these leases, and in July and August of 1986 it attempted to persuade the independent contractors to enter into a labor agreement. The contractors refused to recognize the union, and in August and October of 1986 the union engaged in organizational picketing at the Pevler Complex.

In December of 1986 a member of UMW Local 1827 filed a grievance against Agipcoal, alleging that the company had violated Article IA(h)(1) of its collective bargaining agreement. That article prohibited employers from leasing coal lands for the purpose of avoiding application of the agreement.

The dispute went before an arbitrator pursuant to Article XXIII of the labor agreement. The company argued that the grievance was barred by a 10-day limitations pe-

riod incorporated in section (b) of the article. The arbitrator rejected this argument, holding that the leasing of the Pevler Complex constituted a continuing violation of the labor agreement; because the violation was continuing, the arbitrator concluded, the grievance had been timely filed. The arbitrator ruled against the company on the merits of the dispute and directed prospective termination of the leases.

Agipcoal filed a complaint in the United States District Court for the Eastern District of Kentucky asking that the arbitrator's decision be vacated. A magistrate recommended that the award be vacated because the arbitrator had "ignored the plain language" of the agreement:

"Since the record contains no evidence indicating that these parties intended to depart from the clear language of the agreement, the undersigned is of the opinion that the arbitrator's decision conflicts with the express terms of the agreement and cannot be rationally deduced from the agreement. The arbitrator has ignored the plain language of the agreement and has dispensed his own industrial justice."

The district court accepted the magistrate's recommendation and entered an order vacating the award. This appeal followed.

We must decide whether the "essence" of the arbitrator's decision was drawn from the collective bargaining agreement, or whether the arbitrator "dispense[d] his own brand of industrial justice." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). In *United Paperworkers International Union v. Misco*, 98 L.Ed.2d 286, 299 (1987), the Supreme Court reaffirmed that the answer to such a question does not depend on whether the arbitrator's decision was correct as a matter of law:

"[T]he arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." (Emphasis supplied.)

The arbitrator in the present case was, in our opinion, "arguably" construing and applying the contract. The arbitrator did not ignore the 10-day provision of the bargaining agreement, but attempted to apply it in conjunction with a "continuing violation" concept that is well established in both arbitral and judicial precedents.

It may well be true that the arbitrator committed serious error in applying the continuing violation concept here. It may also be true that the arbitrator ought not to have deemed the Pevler leases to be continuing violations. We, however, "do not sit to hear claims of factual or legal error by an arbitrator." 98 L.Ed.2d at 299. Where the contract language is not "sufficiently clear so as to deny the arbitrator the authority to interpret the agreement as he did," *Misco* requires that the arbitrator's decision be enforced. *Eberhard Foods, Inc. v. Handy*, 868 F.2d 890, 893 (6th Cir. 1989). That, we believe, is the situation presented in the case at bar.

The judgment of the district court is REVERSED, and the case is REMANDED for further proceedings not inconsistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 87-195

ENOXY COAL, INC.

PLAINTIFF,

VS:

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; DISTRICT 30, UNITED MINE WORKERS OF AMERICA; LOCAL UNION NO. 1827, UNITED MINE WORKERS OF AMERICA

DEFENDANTS.

Eastern District of Kentucky
FILED

SEP 06 1988

AT PIKEVILLE
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

MEMORANDUM OPINION, ORDER AND JUDGMENT

This action is before the Court on defendants' objections and exceptions to the Magistrate's Report and Recommendation wherein the Magistrate recommends that the plaintiff's motion for a judgment vacating the arbitrators' award be GRANTED; and that defendants' motion for a partial summary judgment that the grievance in question was timely filed and for enforcement of the award be DENIED.

This Court has jurisdiction pursuant to § 301(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 185(a).

This Court is aware of its very limited role in reviewing an award of an arbitrator. *United States Steel Workers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *United Paper Workers International Union v. Misco*, 108 S.Ct. 364 (1987).

The Sixth Circuit Court of Appeals has established certain guidelines for review of arbitrators' awards to-wit:

[1] We are fully cognizant of the favored status the federal law accords arbitration and arbitrators' awards. See the "Steelworkers Trilogy" beginning at *United Steelworkers of America v. American Mfg.Co*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed. 2d 1403 (1960); *Retail Clerks v. Lion Dry Goods, Inc.*, 341 F.2d 715 (6th Cir. 1965). An arbitrator's powers are not, however, completely untrammeled. As the Supreme Court observed in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1368, 1361, 4 L.Ed. 2d 1424 (1960), the third of the "Trilogy" cases,

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from any sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

This court has consistently adhered to the principle that an arbitrator may construe ambiguous contract language, but lacks authority to disregard or modify plain or unambiguous contract provisions.

Sears, Roebuck & Company v. Teamster's Local Union No. 23, 683 F.2d 154 at page 155 (6th Cir. 1982).

After having reviewed the entire record and making a *de novo* determination upon the record, the Court is of the opinion that the Magistrate correctly determined that the arbitrator has ignored the plain language of the Article XXIII(d) of the agreement and has dispensed his own brand of industrial justice when he determined that the grievance alleged a continuing violation under the facts herein.

In accordance herewith and the Court being advised,

IT IS ORDERED AND ADJUDGED:

1. That the defendants objections to the Magistrate's Report and Recommendation are OVERRULED.
2. That the Magistrate's Report and Recommendation is AFFIRMED and ADOPTED as the findings of fact and conclusions of law of the Court.
3. That the defendants' motion for a partial summary judgment of timely service of grievance and enforcement of the award is DENIED.
4. That the plaintiff's motion for a judgment on the pleading vacating the award is GRANTED and the arbitrators' award is hereby vacated, SET ASIDE and held for naught.
5. That the defendants' counterclaim seeking an enforcement of the award is DISMISSED.
6. That this action is STRICKEN from the docket at the defendants' costs.

This 6th day of September, 1988.

/s/ Karl S. Forester
KARL S. FORESTER
JUDGE

NOTICE IS HEREBY GIVEN OF THE ENTRY OF THIS ORDER OR JUDGMENT ON 9-6-88
LESLIE G. WHITMER, CLERK
BY: /s/ K. Ratliff D.C.

UNITED STATES DISTRICT COURT EASTERN
DISTRICT OF KENTUCKY PIKEVILLE

CIVIL ACTION NO. 87-195

ENOXY COAL, INC.,

PLAINTIFF

vs.

INTERNATIONAL UNION, UNITED MINE WORKERS OF
AMERICA, ET AL.

DEFENDANTS

Eastern District of Kentucky
FILED

DEC 09 1987

AT PIKEVILLE
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

MAGISTRATE'S REPORT AND RECOMMENDATION

Enoxy Coal, Inc., has filed this action seeking a declaration that an arbitrator's decision is unenforceable. 29 U.S.C. 185(a); 28 U.S.C. 2201. The defendants are the three levels of the United Mine Workers of America [UMWA]—Local No. 1827, District 30, and the International Union. Presently pending are the plaintiff's motion for judgment on the pleadings pursuant to Rule 12(c), and the defendants' motion for partial summary judgment pursuant to Rule 56. This matter has been referred to the undersigned for initial consideration and a report and recommendation. 28 U.S.C. 636(b)(1)(B).

The undersigned recognizes that "the standard for judicial review of arbitration decisions is 'extremely lim-

ited.' " *Brotherhood Railway Carmen v. Norfolk and Western Railway*, 745 F.2d 370, 375 (6th Cir. 1984), quoted in, *Schneider v. Southern Railway Company*, 822 F.2d 22 (6th Cir. 1987). The Sixth Circuit recently emphasized that the reviewing court cannot set aside an arbitrator's decision based upon a different interpretation of the contract. See *Dobbs v. Local No. 614*, 813 F.2d 85, 86 (6th Cir. 1987).

The reviewing court, however, can set aside an arbitrator's decision which fails to "draw its essence from the collective bargaining agreement." *Id.* An opinion and award fails to draw its essence from the agreement if the award conflicts with the express terms of the agreement; imposes additional requirements which are not expressly stated in the agreement; lacks rational support or cannot be rationally derived from the terms; or is based upon general considerations of fairness and equity instead of the exact terms of the agreement. *Dobbs*, 813 F.2d at 86, citing, *Cement Divisions, National Gypsum Co. v. United Steelworkers of America*, 793 F.2d 759, 766 (6th Cir. 1986).

The facts are basically undisputed, but the critical issue presented by this action is whether Arbitrator Stephen L. Hayford's decision that the challenged grievance was timely under a "continuing violation" theory drew its essence from the terms of the collective bargaining agreement.

According to the defendants, this issue of "procedural arbitrability" is to be left to the arbitrator for decision. See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555-59 (1964) (action brought to compel arbitration). The undersigned agrees with this statement; however, this proposition does not mean that the arbitrator's decision on an issue of procedural arbitrability is not subject to judicial review under the aforementioned standard. As the defendants have noted, the Sixth Circuit in *Detroit Coil v. International Association of Machinists & Aerospace Workers, Lodge #82*, 594 F.2d 575 (1979), remanded the

action with directions to set aside the arbitrator's decision where he had ignored the plain meaning of the agreement terms regarding a procedural requirement for arbitrability. *Id.* at 580-81. The arbitrator's decision herein is subject to judicial review.

On June 1, 1969, Island Creek Coal Company assembled leases for the mineral rights to approximately 13,000 acres of virgin coal lands in Martin County, Kentucky, from Pocohontas Land Corporation. This area is referred to as the Pevler Complex [hereinafter Pevler]. On December 28, 1981, Enoxy acquired Island Creek's rights and continued Island Creek's practice of using independent contractors to develop Pevler. Enoxy pays royalties to Pocohontas Land.

Until October 1984, Enoxy was operating a mine at Pevler using union labor. Enoxy closed Mine 23A and laid off its workers due to the decline in the coal market and the high cost of operating the mine. Enoxy has continued to develop Pevler by entering into standard mining agreements¹ with independent contractors which sell all the coal they mine on Pevler to Enoxy.

Following the 1984 mine closing, the union filed a grievance within the ten-day period established by Article XXIII(d) of the 1984 National Bituminous Coal Workers Agreement [hereinafter NBCWA]. Arbitrator Thomas Phelan found that Enoxy had not violated Article IA(h)(1)² of

¹ Under Enoxy's standard mining agreement, the independent contractor accepts responsibility for its operations and its workforce. The agreement places neither requirements nor prohibitions regarding union concerns upon the independent contractor.

² Article IA(h)(1) paragraph 1 provides:

Section (h) Leasing, Subleasing and Licensing Out of Coal Lands

(1) The Employers agree that they will not lease, sublease or license out any coal lands, coal producing or coal preparation facilities where

the NBCWA by closing its mine for economic reasons. Phelan found no causal connection between Enoxy's leasing virgin coal lands to independent contractors and Enoxy's closing of its mine.

After Phelan's decision, Enoxy executed its standard mining agreement with other independent contractors which were to develop more of the virgin coal lands of Pevler. Again, the union filed a grievance alleging a violation of Article IA(h)(1), and again, Phelan found no violation. Thereafter, Enoxy entered into additional standard mining agreements with independent contractors KTK Mining and Construction Company [KTK] on May 6, 1986, and Highwire, Inc., on July 1, 1986.

KTK and Highwire are non-signatories of the 1984 NBCWA. During July and August of 1986, the union began negotiating with KTK and Highwire in an attempt to get them to recognize the United Mine Workers of America [UMWA] as the representative of their employees. The union tried to persuade Enoxy to encourage its independent contractors to sign the 1984 NBCWA. Enoxy declined. KTK and Highwire resisted the union's efforts, and the certain members of Local No. 1827 picketed at Pevler during August and October of 1986 in response.

On December 29, 1986, the grievance which is the basis of the challenged arbitration decision lists Rex Collins, a member of Local No. 1827, as the primary grievant. His brother was the president of Local No. 1827 at the time of the picketing and the filing of the grievance. The grievance alleges that Enoxy violated Article IA(h)(1) by leasing, subleasing, or licensing coal lands to Highwire, Inc., KTK, and Kyloh, Inc. (a third independent contractor which did not mine and which is not a party herein) and thereby

the purpose thereof is to avoid the application of this Agreement or any section, paragraph or clause thereof.

eliminating work opportunities for the union miners who had worked for Enoxy until October 1984.

The pertinent provision of the NBCWA is Article XXIII(d), which states, "Any grievance which is not filed by the aggrieved party within ten (10) working days of the time when the Employee reasonably should have known it, shall be denied as untimely and not processed further."

When addressing the issue of procedural arbitrability, Arbitrator Hayford stated,

Because the "et al." grievance at issue here was filed well beyond the ten working day frame established by Article XXIII, Section (d) of the 1984 National Agreement [,] it is incumbent on the Union to demonstrate that the grievance was timely filed and is therefore a proper subject for arbitration.

The Union first claims that the Rex Collins "et al." grievance was timely filed because Mr. Collins did not become aware of the presence of KTK, Inc. and Highwire, Inc. on the Pevler Complex until late December, 1986. It contends further that Mr. Collins' grievance was timely filed because the licensing out actions it challenges constitute a continuing violation of Article IA, Section (h)(1). *Because the undersigned is persuaded that the present grievance does allege a continuing violation of Article IA, Section (h)(1), it is not necessary to address the Union's claim as to the state of Mr. Collins' knowledge regarding KTK and Highwire prior to December, 1986.*

[I]f the licensing out arrangement under which KTK and Highwire mined coal in August, 1986 was in violation of Article IA(h)(1) at that time[,] it continued to be in violation of that provisions in late December, 1986, and remains so today.

(Emphasis added.)

The plaintiff contends it is entitled to judgment because Arbitrator Hayford's decision fails to draw its essence from the collective bargaining agreement. Enoxy argues that the ten-day time limit for filing a grievance under Article XXIII(d) is clear, unambiguous, and mandatory. According to Enoxy, Arbitrator Hayford was dispensing "his own brand of industrial justice," *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 599 (1960); see also *Timken Co. v. Local No. 1123, United Steelworkers of America*, 482 F.2d 1012, 1015 n.2, when he found that although the grievance was filed well beyond the ten-day period, the grievance was arbitrable because Enoxy's leasing or licensing out to KTK and Highwire constituted continuing violations of Article IA(h)(1) with each day of mining at Pevler. [Record No. 1, ex. A, pp. 15-16].

The Sixth Circuit has held that terms in a collective bargaining agreement are to be given their ordinary meaning in the absence of "evidence indicating that the parties to this contract intended to expand or otherwise deviate from that meaning." *Detroit Coal*, 594 F.2d at 580; see also *Dobbs*, 813 F.2d at 88. Of course, the arbitrator can and perhaps should refer to the recognized "law of the shop" or the practices of the industry which provides a context for the agreement. See *Timken*, 482 F.2d at 1015.

In this action, however, the pertinent provision, Article XXIII(d), is clear, unambiguous, and mandatory. The arbitrator specifically found that the grievance was filed well beyond the ten-day period allowed by the terms of the 1984 NBCWA but went on to conclude that the grievance was still arbitrable because he was persuaded by the union's argument that the leasing out was a continuing violation of Article IA(h)(1).

Since the record contains no evidence indicating that these parties intended to depart from the clear language of the agreement, the undersigned is of the opinion that the arbitrator's decision conflicts with the express terms

of the agreement and cannot be rationally deduced from the agreement. The arbitrator has ignored the plain language of the agreement and has dispensed his own industrial justice.

Article XXIII(d) measures the ten-day period from the date upon which the Employee "reasonably should have known" of the agreement violation. In this action, the union, including Local No. 1827 of which Rex Collins was a member, actively negotiated with Enoxy and the two independent contractors after it discovered during the summer of 1986 that Enoxy had leased out mining rights to KTK and Highwire. The union knew of Enoxy's leasing out and knew that the contractors were non-signatories of the 1984 NBCWA before August of 1986. As a member of Local No. 1827, Rex Collins, the grievant, reasonably should have known of the alleged violation as early as the picketing during August 1986. His grievance was not arbitrable under the terms of the NBCWA.

Therefore, because the arbitrator's decision failed to draw its essence from the terms of the NBCWA, the arbitrator's decision should be set aside. The grievance was not timely under the agreement and could not have been processed further. The award should be vacated.

Accordingly,

IT IS RECOMMENDED that the plaintiff's motion for judgment on the pleadings be granted; that the arbitrator's decision be set aside and held for naught; and that the defendants' motion for partial summary judgment be denied. This action should be stricken from the docket.

Particularized objections to this Report and Recommendation must be filed within ten (10) days of the date of service of the same or further appeal is waived. *See Thomas v. Arn*, 728 F.2d 813 (6th Cir. 1983), *aff'd*, 474 U.S. 140 (1985); *Wright v. Holbrook*, 794 F.2d 1152, 1154-55 (6th Cir. 1986). A party may file a response to another party's

objection within ten (10) days after being served with a copy thereof. Rule 72(b), Fed.R.Civ.P.

This the 7th day of December, 1987.

/s/ Joseph M. Hood
JOSEPH M. HOOD
United States Magistrate

DATE OF ENTRY AND SERVICE: DEC 09 1987

CASE NO. 84-30-87-377

In the Matter of Arbitration
Between

UNITED MINE WORKERS OF AMERICA
DISTRICT 30
LOCAL UNION NO. 1827

and

ENOXY COAL CORPORATION

ISSUES: Procedural Arbitrability Licensing Out of Coal
Lands

REX COLLINS, ET AL: Grievants

STEPHEN L. HAYFORD, Arbitrator

PRELIMINARY STATEMENT

This dispute was submitted to arbitration before the undersigned at a hearing held on May 12, 1987 in Prestonsburg, Kentucky. The parties did not file post-hearing briefs

APPEARANCES

For the Union:

Doug Tackett - Field Representative and Spokesman

Rex Collins - Grievant and Witness

Mike Delong - Vice President, Local Union No. 1827
and Witness

For the Company:

Charles Gilliam, Jr. - Labor Consultant and Spokesman

Damon Chaffins - General Manager, Pevler Complex
and Witness

Rick Cantrell* - Superintendent and Witness

I. BACKGROUND AND FACTS

The Company's Pevler Complex is a holding of some 12,500 to 13,000 acres. At present there are nine producing coal mines on the property¹ and one coal processing plant. The nine producing mines are all operated by independent contractors who lease the property from Enoxy Coal Corporation or mine coal under licensing agreements with the Company. Enoxy Coal Corporation owns and operates the processing plant. Some of the coal mined at the Pevler Complex is sold FOB at the pit. The remainder is processed at the preparation plant.

The evidence in the hearing record establishes that the leasing of mine property to independent contractors has been a regular practice at the Pevler Complex since 1972. The practice was initiated by the original owner of the Pevler Complex, Island Creek Coal Company, and continued by Enoxy Coal Corporation when it purchased the Complex in 1982. Until October, 1984 coal was mined at the Pevler Complex by Enoxy Coal and by independent lessee operators. In October, 1984 the Company shut down its last mining operation, Mine No. 23 A and laid off all the bargaining unit members employed there.

A grievance was filed challenging the Company's action in laying off bargaining unit members at Mine 23A while independent operators continued to produce coal at the Pevler Complex. The coal produced by the independent contractors was sold to Enoxy Coal and processed by the

* Mr. Cantrell was also called as a witness by the Union.

¹ In his hearing testimony Superintendent Rick Cantrell identified the nine operators on the Pevler Complex property as follows; Minquist; DMV; Highwire, Solid Energy; Tracy; Thelma; KTK; Long Fork and Fast Track.

Company at its Pevler Complex preparation plant. The subject grievance was advanced to arbitration before Arbitrator Thomas M. Phelan in Case No. 84-30-84-4 (Union Exhibit No. 1). Arbitrator Phelan denied the grievance.

The key to Arbitrator Phelan's analysis was his finding of no "causal connection" between the leasing to independent contractors and the Company's action in shutting down Mine No. 23A. The critical portion of that analysis reads as below.

The evidence of record in the case here makes it clear beyond any doubt that the subleasing to the independent contractors at the Pevler Complex did not cause or result in the layoff of the grievants. There simply was no causal connection between the two events. The shutdown of the #23A Mine and the subsequent layoff of the grievants was not in close proximity to the leasing out, but occurred more than four years after the last lease and more than 14 years after the first lease. In fact, Mine #23A was not even opened until after the last lease to an independent contractor and most of the leasing had taken place even prior to the opening of the #23A Mine. The grievants' layoff really had nothing to do with the leasing.

Leasing had been going on at the Pevler Complex almost from its beginning in 1971 and that historical fact makes it obvious that neither Island Creek nor Enoxy, as its successor, ever intended to develop the entire complex by itself. Independent contractors were used almost from the start and they were used continuously from 1972 to mine coal that Island Creek did not want to mine itself. This is not a situation where the grievants would be working if there had been no leasing. The evidence demonstrated that it simply

was too costly to operate the #23A Mine under the present market conditions for coal. It may well be that the costs of operating that mine were higher, as the Union claimed, because of the safe manner in which it was operated, but the fact remains that a mine can only operate at a loss for so long before something has to be done. In this case, Enoxy chose to close it down because of the continuing losses and that was a valid reason for the closure. The closure was solely for those economic reasons and was unrelated to the leasing to the independent contractors. The grievance here must consequently be denied.

In mid-1986 a grievance was filed by members of the Local Union No. 1827 bargaining unit challenging the Company's failure to assign its employees to perform face-up and reclamation work at the mining sites leased by contractors. That grievance was advanced to arbitration as Case No. 84-30-86-273 (Company Exhibit No. 2) before Arbitrator Phelan. Arbitrator Phelan denied the grievance, finding no requirement in Article IA, Section (h)(1) of the 1984 National Agreement that an operator who properly leases out coal lands to an independent contractor reserve facing up and reclamation work for its own employees.

The present dispute arose as the result of the Company's actions in the Summer of 1986 in entering into licensing agreements for the mining of coal on the Pevler Complex property with three different independent coal operators. Two of those operators, KTK Mining and Construction Company, Inc. and Highwire, Inc., commenced coal production in or shortly after July, 1986. KTK and Highwire are both nonunion operators. There is no evidence in the hearing record indicating that Enoxy Coal Corporation had ever contracted for the mining of coal on the Pevler Complex property with a nonunion operator prior to 1986.

Because of concerns raised by the Union regarding the leases to KTK, Highwire and Kyloh, Inc. (the third operator) two meetings were held in June and July, 1986 between officials of Enoxy Coal and representatives of the Union from the Local, District and International levels. The Union apparently requested these meetings with the Company because all three of the new lessee-operators had refused to recognize the UMWA as representative of their employees and therefore had not become signatories to the 1984 National Agreement. No change in the non-signatory status of KTK, Highwire or Kyloh occurred as a result of the meetings between Company and UMWA officials.

Sometime in August, 1986 a strike and/or informational picketing was engaged in by certain members of the Local Union No. 1827 bargaining unit. Although the evidence is somewhat unclear Company Exhibit No. 1 satisfactorily establishes that the strike and/or informational picketing was prompted by the Company's action in licensing out coal lands to nonunion operators. No grievance was filed in August, 1986 protesting that action by the Company.

The present grievance was filed on December 29, 1986. The grievance document (Joint Exhibit No. 1) lists Rex Collins, et al as the grievant and states as follows:

The Company has violated Article I A (h) (1) Paragraph 1 and all applicable Articles of the NBCWA of 1984 through its lease, sublease or licensing of coal lands to Highwire, Inc., KTK, Kyloh, Inc., thereby eliminating work opportunities. Compliance with Article I A (h) (1), all other applicable Articles, to be made whole, including but not limited to, lost wages, seniority, contractual days, etc., is the remedy requested. (sic)

The grievance progressed through the contractual procedure without resolution and was advanced to arbitration before the undersigned in the manner described above.

II. THE ISSUE

At the leave of the parties the Arbitrator has determined the issues before him in this dispute to be:

1. Is the instant grievance arbitrable? and if so,
2. Did the Company violate Article IA, Section (h) or any other provision of the 1984 National Agreement by virtue of its actions in licensing out coal lands in the Pevler Complex to KTK Mining and Construction Company, Inc. and Highwire, Inc. and entering into certain contractual arrangements with Kyloh, Inc.? If so, what is the proper remedy?

III. RELEVANT NATIONAL AGREEMENT PROVISIONS

A. ARTICLE I - ENABLING CLAUSE

B. ARTICLE IA - SCOPE AND COVERAGE

Section (a)

Work Jurisdiction

Section (d)

Management of the Mines

Section (f)

Application of This Contract to the Employer's Coal Lands

Section (h)

Leasing, Subleasing and Licensing Out of Coal Lands

C. ARTICLE XXIII

Section (c)

Grievance Procedure

Section (d)

Ten Day Limitation

D. ARTICLE XXVI - DISTRICT AGREEMENT**Section (b)**
Prior Practice and Custom**IV. POSITION OF THE UNION****Procedural Arbitrability**

The Union's contention that the present grievance is a proper subject for arbitration is of two dimensions. First, it claims that Rex Collins, the primary grievant, filed the grievance only five days after he became aware of the presence of nonunion operators on the Pevler Complex property. Collins testified that his brother, the Local Union No. 1827 President, told him KTK and the other operators were mining coal at the Pevler Complex after the Local Union learned of that fact by the notice procedures of the (unspecified) bankruptcy laws. The Union notes that Collins was laid off in March, 1986 and was not present at the Pevler Complex during the strike/informational picketing in August, 1986.

In addition to the above claim, the Union maintains that the fact that the Company's actions did go unchallenged for several months does not preclude this grievance from begin arbitrated. Because it believes that the Company's licensing out of mining operations to nonunion operators constitutes a continuing violation of the 1984 National Agreement that is repeated with each lump of coal those licensees mine, the Union insists that the December 29, 1986 grievance at issue here was timely filed and is a proper subject for arbitration. The Union cites several prior awards by panel arbitrators in support of its procedural arbitrability arguments.²

² Case No. HCCC 84-28-86-1; Case No. 84-2-84-2; Case No. 84-28-86-160; *Wyoming Fuel Company Golden Eagle Mine and UMWA District 15, Local 9856* (October 17, 1985); Case No. 78-2-81-90; Case No. BCOA 84-28-84-4; Case No. 84-2-85-31; Case No. 84-17-86-655; Case No. 84-12-86-701; Case No. 84-28-86-114.

The Merits

The Union asserts that the Company's challenged actions have resulted in violations of Articles I; IA (f); IA(h)(1); XVII; XX and XXVI (b) of the 1984 National Agreement. Although it did not articulate the theory underlying its belief, the Union avers that the Award of Arbitrator Phelan in Case No. 84-30-84-4 (Union Exhibit No. 1) should be accorded *res judicata* effect in this proceeding. The Union submits that in Case No. 84-30-84-4 the Company took the position that no contract violation had taken place because the lessees on the Pevler Complex property were not avoiding the National Agreement. It believes the Company is therefore precluded from arguing in this case that the nonunion status of KTK, Highwire and Kyloh is not a factor.

The Union reads Article IA, Section (h)(1) of the 1984 National Agreement as barring the Company from entering into licensing or leasing agreements that allow it to avoid any of the Agreement's provisions. It is convinced that the licensing contracts at issue here were formulated in a manner that permits the Company to avoid its obligations under the National Agreement. The Union points out that the hearing testimony establishes that the various nonunion licensee operators at the Pevler Complex are paying their employees substantially less than the wage rates called for by the National Agreement and that no benefits are paid those workers.³ By its test, the challenged licensing arrangements with those nonunion operators are so advantageous to the Company (in terms of the cost of the coal produced at the Pevler Complex) as

³ Union witness Collins cited an \$8.00 hourly wage (with no benefits) being earned by his brother who is employed by Highwire. Union witness Delong testified to his knowledge of truck drivers employed by KTK, Inc. being paid a \$5.00 hourly wage with no benefits. In cross-examining Mr. Delong the Company Spokesman asserted that KTK, Inc. subcontracts for its coal haulage.

to constitute an avoidance of the application of the National Agreement. The Union rejects what it sees as the Company's characterization of the disputed licensing contracts as a sound business decision. The Union claims that the coal being mined by the nonunion licensee operators is on the Company's coal lands and that the Company is using the licensing arrangements as a vehicle for avoiding the application of the 1984 National Agreement to the mining of that coal on its coal lands.⁴

Peveler Complex General Manager Damon Chaffins testified that the nonunion licensee operators are not permitted to sell their own coal. Enoxy Coal Sales Division (the exact name of the Company's sales division was not made clear) sells the coal KTK, Inc. and Highwire, Inc. mine. Superintendent Cantrell testified that Enoxy Coal's long-term contractual coal sales commitments to Carolina Power are being met in part by coal produced by KTK and Highwire.

In conclusion the Union submits that the evidence and foregoing argument prove that the Company is in fact violating the 1984 National Agreement by its use of non-union licensee operators to produce coal at the Peveler

⁴ The Union submitted the following panel arbitrator awards in support of this aspect of its argument on the merits: Case No. 84-30-86-229; Case No. 84-28-86-169; Case No. 84-17-85-258; Case No. 84-12-86-920; Case No. 84-12-86-720; Case No. 78-23-80-154; Case No. 78-2-79-48; Case No. 17-79-KD-200; *UMWA Local 2487 and Blue Creek Mining Company, Inc.* (April 2, 1987); *Black Diamond Coal Mining Co. (Oswago Mine)* and *UMWA District 20 Local Union No. 8460* (December 3, 1985); Case No. 84-17-85-178; Case No. 81-12-85-207; Case No. 81-17-KD-171; Case No. 81-17-83-L129; *Kinlock Coals, Inc., Oakman, Alabama* and *UMWA District 20* (June 28, 1985); Case No. 84-17-85-327;

In addition, the Union cites: *Kris-Beth & Elm Coal, Inc. v. District 17, United Mine Workers of America, Local Union No. 6243*, Civil Action No. 85-1813 (February 27, 1986) and *Big Bear Mining Company v. District 17, United Mine Workers of America, Local Union No. 7612*, Civil Action No. 83-5016 (April 19, 1983).

Complex which it sells to satisfy its coal sales contract commitments. It insists that the ongoing nature of the Company's contractual violations is established by the disclosure at the hearing that two additional nonunion, non-signatory licensees (Fast Track and Long Fork) are now mining coal at the Pevler Complex. Accordingly, it asks that the instant grievance be sustained in its entirety.

V. POSITION OF THE COMPANY

The Company prefacing its argument on the question of procedural arbitrability and the merits of this dispute by contending that the licensing contracts it has entered into with Kyloh, Inc. are not within the scope of the controversy. It contends that the effectuation of any contract between Kyloh, Inc. and Enoxy Coal Corporation must await the final resolution of certain United States District Court bankruptcy proceedings involving Rebel Coal Company, Inc. The Company insists that because its leasing arrangement with Kyloh, Inc. has not yet led to in the production of coal, it cannot be said to have resulted in any arguable violation of the 1984 National Agreement. Therefore, the Company argues the Kyloh, Inc. licensing agreement is not a proper subject for consideration by the Arbitrator.

Procedural Arbitrability

The Company asserts that the instant grievance, as it relates to KTK, Inc. and Highwire, Inc., was untimely filed and is therefore inarbitrable. It insists that the Union was aware of the licensing out arrangements with KTK and Highwire at the time of the two July, 1986 Company-Union meetings discussed earlier. In the Company's view, the very latest date the Union (and its various officials) can be said to have been aware of the contractual arrangement it has with KTK and Highwire is October 21, 1986, the date of Arbitrator Phelan's Award in Case No. 84-30-86-273 (Company Exhibit No. 2), which involved the Union's

challenge to the facing up and reclamation work done by KTK and Highwire at their respective mine sites. That Award issued more than two months before the December 29, 1986 date of the present grievance, far in excess of the ten working days maximum period for filing a timely grievance established by Article XXIII, Section (d) of the 1984 National Agreement.

The Company believes that both Article XXIII, Section (d) and the policy articulated in Article XXIII, Section (e) of the 1984 National Agreement support a finding that the grievance is procedurally inarbitrable.⁵ Accordingly, it asks that the Arbitrator so hold and dismiss the grievance of Rex Collins⁶.

The Merits

The preceding arguments notwithstanding, the Company maintains that no violation of Article IA, Section (h)(1) of the 1984 National Agreement has been made out by the Union. First, it avers that the mere act of contracting (licensing) out coal lands by an Employer does not constitute a violation of Article IA, Section (h)(1)⁷. The Company contends further that there can be no presumption that an Employer's contracting (licensing) out action has

⁵ *Peabody Coal Company Camp No. 1 Mine and UMWA District 23, Local Union 1793*, Case No. 84-24-86-45 PCC (January 9, 1987) Stanley H. Sergent, Jr., Arbitrator and *Kitt Energy Corp. and Local 2095, District 31 UMWA*, Case No. 81-31-83-75 (October 4, 1983) Fred Witney, Arbitrator.

⁶ The Company cites the following additional panel arbitrator awards and other authorities in support of its procedural arbitrability claim: Case No. 84-17-86-339; Case No. 84-30-85-132; *Detroit Coal Company v. IAMAW Lodge #82*, 594 F.2d 575 (6th Cir. 1979); *Arbitration Review Board Decision No. 553*; Case No. 84-12-86-556; Case No. 84-30-86-249; Case No. 84-6-85-68; Case No. 81-30-84-694; Case No. KD - 17-85-91; Case No. KMC/D-22-86-67.

⁷ *UMWA District 30, Local Union 5714 and Beth Energy Corporation*, Case No 84-30-86-236 (October 17, 1986) Thomas M. Phelan, Arbitrator.

been taken for the purpose of avoiding application of the National Agreement.⁸ Rather, it avers the Union must prove that the Employer in licensing out its coal lands acted with the intent of avoiding the National Agreement. The Company maintains that proof of an intent to avoid the National Agreement cannot properly be found, merely because the challenged licensing out arrangements resulted in avoidance of the National Agreement.⁹

The Company insists that in this case it is "absolutely clear" that there was no motive to avoid the National Agreement reflected in its contracting (licensing) actions with regard to KTK, Inc. and Highwire, Inc. It cites four primary reasons for that assertion.

1. Contracting (licensing) out of coal lands on the Pevler Complex is an established practice that began under the predecessor employer, Island Creek Coal, in 1972. The Company characterizes the contracts with KTK and Highwire as the continuation of that longstanding practice.
2. The contracts with KTK, Inc. and Highwire, Inc. were entered into for valid, good faith economic reasons. The coal lands involved in the leases had not been previously mined by Enoxy Coal. No Enoxy Coal employees were replaced by Highwire and KTK employees.
3. KTK, Inc. and Highwire, Inc. are neither required nor proscribed from being signatories to the 1984 National Agreement. The Company claims that subject only to the provisions of federal labor law, Highwire and KTK are free to become signatories to the National Agreement and the Union is free to attempt to organize the employees of the two licensee operators.

⁸ *UMWA Local Union 1532 and Island Creek Coal Company*, no case number, (January 10, 1973) Charles L. Garvin, Arbitrator.

⁹ *Coalite, Inc. and UMWA District 20, Local Union No. 2,225*, Case No. 78-20-81-510. (June 10, 1981) Jack Clarke, Arbitrator.

4. The Company insists that the Union cannot argue that its failure to contract (license) out to a signatory operator constitutes proof of intent to avoid the National Agreement as proscribed by Article IA, Section (h)(1). It observes that Article IA Section (h) of the 1978 National Agreement required that all work on leased, subleased or licensed lands be performed by members of the UMWA. The Company points out that in *Amax Coal Co. v. NLRB*, 614 F.2d 872 (3d. Cir. 1980), the U.S. Court of Appeals for the Third Circuit affirmed the earlier holding by the National Labor Relations Board that Article IA, Section (h) of the 1978 National Agreement violated Section 8(a) of the *National Labor Relations Act* (NLRA). By the Company's test, any argument by the Union that failure on its part to require that its contractor (lessee) operators be signatory operators is in reality an attempt to resurrect the component provision of Article IA, Section (h) of the 1978 National Agreement held in violation of Section 8(a) of the NLRA by the NLRB and the U.S. Court of Appeals for the Third Circuit.¹⁰

In another dimension of its case on the merits the Company contends that it is not contractually barred from contracting (licensing) out its coal lands while members of the Local Union No. 1827 bargaining unit are on layoff. It argues that the National Agreement bars only the licensing out of an Employer's existing operations that is the proximate cause of a layoff of employees of the Employer.¹¹ The Company avers that the challenged licensing

¹⁰ The Company cites the following additional panel arbitrator awards in support of this aspect of its argument on the merits of this dispute; *UMWA Local Union No. 1532 and Island Creek Coal Company Gund Mine No. 44, Turkey Creek, Kentucky*, Charles L. Garvin, Jr., Umpire; Cases Nos. RBR-84-05-86-12 and RBR-84-05-86-13; Cases Nos. 81-28-82-138 and 81-28-82-139; Case No. 84-30-85-67; Case No. 78-20-81-51.

¹¹ *UMWA District 30, Local Union 1827 and Enoxy Coal Company*, Case No. 84-30-84-4 (February 8, 1985) Thomas M. Phelan, Arbitrator.

out agreements with KTK, Inc. and Highwire, Inc. were not the proximate cause of the layoff of any Local Union No. 1827 bargaining unit members.

The last coal mining operation of Enoxy Coal, Mine No. 23A, was shut down in October, 1984. In Case No. 84-30-84-4 Arbitrator Phelan denied the grievance filed by Local Union No. 1827 that challenged the closure of Mine 23A. The key to Arbitrator Phelan's decision in that Case was his finding that the leasing (licensing) of Pevler Complex coal lands to independent operators did not cause the lay-off of the Mine 23A employees. The Company insists Case No. 84-30-84-4 is *res judicata* with regard to this aspect of the current dispute.¹²

The Company argues further that nothing in the 1984 National Agreement obligates KTK, Inc., Highwire, Inc. or any other contractor (licensee) operator that mines virgin coal lands that Enoxy Coal has not previously mined to hire laid off Enoxy Coal employees. It interprets Article IA, Section (h)(2) to require licensees to hire the licensor Employer's employees only when the Employer licenses out one of its operations. It finds in Article IA, Section (h)(2) no general requirement that an Employer licensor require its licensee(s) to hire from among all of its laid-off employees. Rather, the licensee is required only to offer employment to those employees laid off from an operation it takes over from the licensor Employer.

¹² The Company cites the following additional panel arbitrator awards and other authorities in support of this dimension of its argument on the merits: Case No. 84-30-86-249; *Amax Coal Company* *supra*; Case No. 84-17-86-524; *Clinchfield Coal Company, et. al v. District 28 United Mine Workers of America & Local Union #1452*, 720 F.2d 1365 (4th Cir. 1983); Case No. 84-17-86-299; *Clinchfield Coal Company, et. al v. District 28 United Mine Workers of America & UMWA, Local Union No. 1098*, 737 F.2d 998 (4th Cir. 1984); Case No. 17-77-925; *Arbitration Review Board Decision No. 253*; Case No. 17-76-628; Case No. 84-30-86-239; Case No. 84-17-85-258.

The Company believes the more important point with regard to this dispute is its contention that the 1984 National Agreement imposes no hiring obligation with regard to laid-off employees of a licensor-Employer on a contractor (licensee) that is mining coal on virgin coal lands where there are no operations of the licensor Employer. It claims the Union cannot be permitted to achieve that result by this arbitration when the 1984 National Agreement imposes no such requirement.

In the final component of its argument, the Company takes issue with the Union's reliance on the decision of Arbitrator Render in Case No. 84-30-86-224 (Union Exhibit No. 20). It emphasizes that in that case Arbitrator Render found no violation of Article IA, Section (h), which is the only provision of the 1984 National Agreement it believes to be at issue here. In addition, the Company is convinced that the Award in Case No. 84-30-86-229 (which is based on a finding of a violation of the successor clause contained in Article I of the 1984 National Agreement) violates Section 8(e) of the NLRA. For all of these reasons, it asks that Arbitrator Render's Award be dismissed as irrelevant and not weighed by the Arbitrator.

Based on all of the foregoing argument the Company takes the position that no violation of the 1984 National Agreement has been made out. Accordingly, it asks that the instant grievance be denied.

VI. DISCUSSION

Procedural Arbitrability

The evidence in the hearing record establishes that KTK, Inc. and Highwire, Inc. commenced mining coal at the Pevler Complex not later than August, 1986. The instant grievance was filed on December 29, 1986. Because the "et al." grievance at issue here was filed well beyond the ten working day time frame established by Article XXIII, Section (d) of the 1984 National Agreement it is incumbent

on the Union to demonstrate that the grievance was timely filed and is therefore a proper subject for arbitration.

The Union first claims that the Rex Collins "et al." grievance was timely filed because Mr. Collins did not become aware of the presence of KTK, Inc. and Highwire, Inc. on the Pevler Complex until late December, 1986. It contends further that Mr. Collins' grievance was timely filed because the licensing out actions it challenges constitute a continuing violation of Article IA, Section (h) (1) of the 1984 National Agreement. Because the undersigned is persuaded that the present grievance does allege a continuing violation of Article IA, Section (h)(1), it is not necessary to address the Union's claim as to the state of Mr. Collins' knowledge regarding KTK and Highwire prior to December, 1986.

KTK, Inc. and Highwire, Inc. did in fact commence mining coal at the Pevler Complex not later than August, 1986. No grievance was filed in August, 1986. Nevertheless, if the licensing out arrangement under which KTK and Highwire mined coal in August, 1986 was in violation of Article IA, Section (h)(1) at that time it continued to be in violation of that provision in late December, 1986 and remains so today. The contract violation alleged by the present "et al." grievance is not a discrete, one-time occurrence (like a discharge or the awarding of a contract to repair a piece of equipment to an outside firm). Rather, that alleged violation continues every day Highwire, Inc. and KTK, Inc. mine coal at the Pevler Complex under the Union Exhibit Nos. 4 and 5 Mining Contacts executed respectively in May, 1986 and July, 1986. Thus, if the Company's disputed actions were determined to actually be in violation of the 1984 National Agreement the scenario would be one of a prototypal continuing violation. In such a circumstance the Union's failure to grieve at the time the contract violation commenced cannot be said to estop it from challenging that ongoing violation in the future.

In light of the above findings and having fully considered all of the relevant panel arbitrator awards and other authorities adduced by the parties, the Arbitrator has determined that the December 29, 1986 "et al." grievance submitted by Rex Collins on his own behalf and on behalf of the members of the Local Union No. 1827 bargaining unit was timely filed and is a proper subject for arbitration pursuant to Article XXIII of the 1984 National Agreement. However, because the evidence shows that Kyloh, Inc. has not yet mined any coal at the Pevler Complex, the Company's contractual arrangements with Kyloh do not present any current question of a possible violation of the 1984 National Agreement. Therefore, the Enoxy Coal-Kyloh Mining Contract is not a proper matter for consideration by the Arbitrator here. Given the above findings, the focus of this analysis will now turn to the merits of the present controversy as they relate to the KTK, Inc. and Highwire, Inc. Mining Contracts.

The Merits

At the outset it is important to precisely define the scope of this dispute and to identify the contract language at issue. In approaching this initial task the Arbitrator has carefully read the some thirty-four authorities pertaining to the merits introduced into the hearing record by the parties.

The Mining Contracts between Enoxy Coal, Inc. and Highwire, Inc. and KTK Mining and Construction Co., Inc. that are Union Exhibits Nos. 4 and 5 respectively, both state in Article IA, A. that the "[c]ontractor will mine, remove, transport and deliver, in the manner and by the methods herein specified, the coal in and from the Stockton seam(s) of coal . . .". A full and careful reading of the two aforementioned Mining Contracts, juxtaposed with the relevant hearing testimony indicates that the contractual arrangements between Enoxy Coal and KTK and Highwire are licensingout agreements whereby the two licensees are

granted the right to mine coal on the Company's Pevler Complex and are obligated to deliver all of that coal to Enoxy Coal for sale.¹³ Two documents entitled "Bill of Sale" (dated August 5, 1986) that are part of Union Exhibit No. 5 indicate that KTK, Inc. purchased one 6 ft. Guyan Mine Fan and one Joy 15 RU Cutting Machine and one Joy 14 BU10 Loading Machine from Enoxy Coal.

There is no evidence to indicate that Highwire, Inc. purchased any mining equipment from Enoxy Coal, Inc. However, the Bill of Sale document that is part of Union Exhibit No. 3 shows that on September 3, 1986 Enoxy Coal sold certain mining equipment (including a shovel, eight haulage trucks and a drill) to Minquip, Inc. That Bill of Sale indicates that the President of Minquip, Inc. is a B.W. McDonald. B.W. McDonald is also indicated as the President of Highwire, Inc. on the Union Exhibit No. 4 Mining Contract between Highwire and Enoxy Coal.

Regardless of whether the Mining Contracts between Enoxy Coal, Inc. and KTK, Inc. and Highwire, Inc. are characterized as licensing out or leasing agreements it is clear that by those two instruments Enoxy Coal has contracted with Highwire and KTK to mine coal on Pevler Complex property it either owns or leases. It is further established that Highwire and KTK sell all of the coal they mine at the Pevler Complex to Enoxy Coal, which uses that coal to meet its contractual coal sales commitments. Both KTK, Inc. and Highwire, Inc. are nonunion operators. Neither corporation is a signatory to the 1984 National Agreement.

The Union does not claim and the evidence adduced by the parties does not on its face indicate that either KTK,

¹³ As noted earlier, Pevler Complex Manager Damon Chaffins testified that KTK, Inc. and Highwire, Inc. do not have the right to sell the coal they mine at the Pevler Complex. Chaffins stated further that Enoxy Coal and/or its coal sales subsidiary sell all of the coal mined by KTK and Highwire.

Inc. or Highwire, Inc. is a subsidiary, an affiliate or a successor to Enoxy Coal, Inc. Given that fact, Article IA, Section (f) of the 1984 National Agreement cannot be deemed applicable to this controversy. It will not be considered further here.

The "contracted area" of the Pevler Complex assigned to Highwire, Inc. by the terms of the October 17, 1986 Supplemental Agreement that is part of Union Exhibit No. 4 is what the Company characterizes as a "virgin tract of coal" (i.e., coal lands never before mined by Enoxy Coal or any other licensee operator). The same label is applied by the Company to the "contracted area" described in the Union Exhibit No. 5 KTK, Inc. Mining Contract. Although the record is somewhat unclear it appears that pursuant to Article II B. of the July 1, 1986 Mining Contract between Enoxy Coal and Highwire (Union Exhibit No. 4) Highwire, Inc. is also performing some auger mining in what Pevler Complex General Manager Chaffins referred to as an "old deep mine seam" formerly mined by Janson (phonetic) Coal and Island Creek coal "that could not be mined by deep mining".

The Union never disputed the Company's claim that the "contract areas" assigned to KTK, Inc. and Highwire, Inc. are virgin tracts of coal land that were never part of an existing or prior operation of Enoxy Coal or its predecessor, Island Creek Coal Company. Consequently, for purposes of the remaining analysis the areas of the Pevler Complex on which KTK and Highwire have, since the Summer of 1986, mined coal under license from Enoxy Coal will be considered the "coal lands" of Enoxy Coal, Inc. and not its "coal mining operations" or "operations" as referred to in Article IA, Section (h) of the 1984 National Agreement. Subsections (2)-(6) of Article IA, Section (h) speak only to the leasing, subleasing and licensing out of "coal mining operations which at any time were in operation by [the] Employer and covered by this Agreement". As just noted there are no "coal mining operations"

or "operations" at issue here. Rather only the "coal lands" of Enoxy Coal Corporation are in dispute. Therefore, subsections (2) through (6) of Article IA, Section (h) of the 1984 National Agreement are not reached here and the analytical paradigms utilized to resolve disputes involving the licensing out, leasing or subleasing of "coal mining operations" or "operations" are not applicable in this analysis.

In the same manner as subsections (2)-(6), the second paragraph of sub-section (1) of Article IA, Section (h) is concerned only with the licensing out of "coal mining operations". Like Arbitrator Phelan in Case No. 84-17-85-258 (Union Exhibit No. 22 and Company Exhibit No. 31) this writer believes that the most rational interpretation of Section (h) of Article IA is one that gives the same meaning to the subsection 1, paragraph two term "coal mining operations" as is utilized for the term in subsection (2). Accordingly, the undersigned has concluded that the limitation on licensing out by an Employer contained in the second paragraph of Article IA, Section (h)(1) of the 1984 National Agreement applies only to "coal mining operations" of an Employer and not to the licensing out only of an Employer's "coal lands". The licensing out arrangements challenged by the present grievance involve only the "coal lands" of Enoxy Coal Inc. Accordingly, the second paragraph of Article IA, Section (h)(1) must be deemed not controlling and of no specific relevance to the proper outcome of this dispute.

The preceding analysis demonstrates that within the context of this dispute the first paragraph of Article IA, Section (h)(1) is the only provision of the 1984 National Agreement that presents a potential limitation to the Company's right to lease, sublease or license out its coal lands. Paragraph one of Section (h)(1) does not place any obligation on a lessee/licensee operator to recognize the UMWA as the bargaining representative of its employees. In the same manner it does not prohibit the Employer (Enoxy

Coal in this case) from leasing or licensing out its coal lands to nonunion operators.

What the first paragraph of Article IA, Section (h)(1) unequivocally does do is bar an Employer in Enoxy Coal's position from leasing or licensing out its coal lands when the purpose of that action is to avoid the application of the National Agreement that would result if the particular leasing or licensing out arrangement were not entered into. By preventing the Employer from utilizing the leasing or licensing out of its coal lands as a vehicle for avoiding the application of the 1984 National Agreement the subject paragraph benefits the (primary) Employer's employees by removing the economic and other incentives for the Employer might realize by shifting the work they normally perform to a nonsignatory lessee/licensee operator. It is this interpretation of the effect the framers of the 1984 National Agreement intended Article IA, Section (h)(1), paragraph one to have that will be relied upon in the remainder of this analysis.

It must be emphasized that unlike subsections (2)-(6) and the second paragraph of subsection (1) of Section (h), the first paragraph of Article IA, Section (h)(1) does not require the Union to demonstrate the existence of a causal relationship between a challenged lease or licensing out arrangement and a layoff of classified employees. Rather, in this case that provision requires that the Union prove that the challenged licensing out arrangements were entered into by the Company for the purpose of allowing it to avoid the application of the 1984 National Agreement that would otherwise occur. In order for the instant grievance to be sustained the Union must be found to have proven that material fact by a preponderance of the evidence.

There are two alternative tests for ascertaining whether the Company's disputed actions in licensing out its coal lands to KTK, Inc. and Highwire, Inc. were taken for the

purpose of avoiding the application of the 1984 National Agreement. The first is a subjective test. Under a subjective test the Company could be found to have acted with the purpose of avoiding the National Agreement only if it is proven to have licensed out its coal lands with an actual intent to avoid the Agreement or with an actual awareness or knowledge that such a result would in fact occur. This is the test for an Article IA, Section (h)(1), paragraph one violation effectively advocated by the Company.

Requiring the Union to prove what was actually in the mind of the Company officials who executed the licensing out agreements (Mining Contracts) with KTK, Inc. and Highwire, Inc. in order to make out a violation of Article IA, Section (h)(1), paragraph one would saddle it with an almost impossible task. Unless those Company officials are willing to make an admission that they acted with the requisite state of mind necessary to prove a purposeful avoidance of the application of the National Agreement the subjective test could be satisfied only if there existed sufficient evidence revealing an improper, unexpressed intent and/or actual knowledge that avoidance of the Agreement would result from the consummation of the Mining Contracts with KTK and Highwire. No such evidence is available in this case and a careful Employer could always ensure it would not be merely by remaining silent and never articulating its intent or knowledge of the likely results (*vis à vis* the National Agreement) when it enters into a leasing or licensing out arrangement with a non-union lessee/licensee operator. By such a simple tactic the proscription of Article IA, Section (h)(1), paragraph one could be easily and effectively mooted under a subjective test for purposeful avoidance of the application of the Agreement.

The second test for determining if the Company acted with the improper purpose of avoiding the application of the 1984 National Agreement employs an objective stand-

ard. Under the objective test no inquiry would be made into the Company's actual intent or knowledge of the results of its challenged actions. Instead, the objective test would ask whether a reasonable Employer in the Company's circumstance in the Summer of 1986 would have been aware (had knowledge) that its actions in licensing out certain of its coal lands to nonunion operators would result in an avoidance of the application of the National Agreement on its part that would otherwise not occur. If the answer to that question is "yes", application of the objective test would result in a finding that Enoxy Coal's licensing out agreements with KTK and Highwire were entered into for the purpose of avoiding the 1984 National Agreement.

Of the two alternative analytical paradigms, the objective test for purposeful behavior is much more likely to produce an accurate determination as to the probable state of mind of the involved Company officials when the Company entered into the licensing out agreements with KTK and Highwire. It is a test that takes into consideration all of the factors attendant to the Company's challenged actions and allows full consideration of the Company's claimed motivation to be made. It does not unfairly prejudice the interests of the Company or the Union. Accordingly, the Arbitrator has concluded that the objective test for purposeful avoidance of the application of the National Agreement is the proper standard for determining if the Company violated Article IA, Section (h)(1), paragraph one.

The Company officials who testified at the arbitration hearing did not claim the Company was unaware that KTK, Inc. and Highwire, Inc. were (or planned to be) nonunion, nonsignatory operators. That fact was apparent to all after KTK and Highwire commenced the production of coal in July, 1986 (or thereabout). Therefore, it can be presumed that as of or before July, 1986 the Company was aware that in producing coal under the Union Exhibits Nos. 4

and 5 Mining Contracts, KTK and Highwire would not adhere to the terms of the 1984 National Agreement.

It must be emphasized that the mere act of an Employer licensing out or leasing its coal lands to a nonunion/non-signatory operator does not violate Article IA, Section (h)(1), paragraph one. The violation of that provision transpires only if the evidence establishes, *inter alia*, that the challenged licensing out/leasing action has enabled the licensor (primary) Employer itself to avoid the application of the 1984 National Agreement that would have occurred in the absence of the subject licensing out/leasing action.

In this case the critical nexus to the Company (as primary Employer) is found in the fact that all of the coal produced by KTK, Inc. and Highwire, Inc. at the Pevler Complex is sold directly to Enoxy Coal, Inc. Thus, by utilization of the challenged licensing out agreements the Company was able for the first time to obtain coal mined from the Pevler Complex by licensee operators not bound by the wage rate, benefits, pension contribution, seniority, safety and other terms of the National Agreement.¹⁴

Given the above facts, the critical question becomes: would a reasonable (primary) Employer that had always dealt with signatory licensee/lessee operators in the past be aware that the act of licensing out a portion of its coal lands to two nonsignatory operators who are contractually obligated to sell all of their production to that Employer would likely result in it (the primary Employer) avoiding the application of the National Agreement? The Arbitrator

¹⁴ The Company's assertion that its challenged licensing out actions were sanctioned under Article XXVI, Section (b) of the 1984 National Agreement as consistent with a long-standing prior practice at the Pevler Complex of licensing out or leasing out coal lands must be rejected. The Company failed to prove, and nothing in the hearing record indicates, that prior to the two licensing out agreements at issue here (KTK and Highwire) it had ever leased or licensed out coal lands on the Pevler Complex to a nonsignatory lessee/licensee operator.

is persuaded that the preponderance of the evidence before him demonstrates that the answer to this critical question must be "yes".

The unavoidable ultimate result of the licensing out agreements between Enoxy Coal, Inc. and KTK, Inc. and Highwire, Inc. is that Enoxy Coal (a primary Employer under the 1984 National Agreement) is able to procure coal from its Pevler Complex coal lands mined at wage rates, etc. much lower than those that would otherwise be reflected in the price of that coal. Thus, by using the licensing out device the Company is avoiding the application of the National Agreement to the coal it sells by substituting the employees of the two nonsignatory licensee operators for the members of the Local Union No. 1827 bargaining unit or the UMWA-represented employees of a signatory operator.¹⁵ If the proscription of the first paragraph of Article IA, Section (h)(1) can be so easily evaded, it would be reduced to a nullity. This writer does not believe the framers of the 1984 National Agreement negotiated the subject provision with such an intent.

The Company is correct in arguing that Article IA, Section (h) cannot properly be interpreted to require KTK and Highwire to become signatories to the National Agreement. As secondary employers they are insulated from the reach of the 1984 National Agreement until they become signatories to it. As noted above, the Company is also correct in the assertion that its failure to license out its coal lands to signatory lessee operators does not constitute sufficient proof of an intent (or purpose) to avoid the National Agreement. However, when an Employer's act of licensing out its coal lands (or a portion thereof) to a nonsignatory licensee operator is coupled with a contrac-

¹⁵ The extent of this substitution effect is made even clearer by the fact that the Company sold various pieces of its mining equipment to KTK, Inc. and to Minquip, Inc. a corporation whose President (B.W. McDonald) is also President of Highwire, Inc.

tual requirement that the licensee operator sell all of its coal to the licensor (primary) Employer, the circle is closed and sufficient proof of a "purpose" to avoid the application of the National Agreement is made out.

The Company's attempt to legitimatize its disputed licensing out actions by characterizing them as having been motivated by good faith, economic/business reasons is nothing more than a meaningless exercise in semantics. It is obvious that the Company's goal in leasing a portion of its coal lands to nonsignatory operators who do not pay the wage and benefits levels called for by the National Agreement is to extricate the coal in the ground at the Pevler Complex at the lowest possible cost. That goal of minimizing the cost of the coal Enoxy Coal Inc. sells to its customers does not somehow legitimatize a licensing out action that otherwise violates the clear proscription of Article IA, Section (h)(1), paragraph one.

The Company cited no basis for its challenged licensing out actions other than the desire to minimize the costs of the coal it sells to its customers implied in the "good faith, economic" reasons it pointed to at the hearing. The goal of minimizing the cost of the coal extricated from a (primary) Employer's coal lands is not a sufficient "other purpose"¹⁶ for an Employer's leasing or licensing out of its coal lands that otherwise appears to have been for the purpose of avoiding the application of the National Agreement to ameliorate the presumption of a violation of Article IA, Section (h)(1), paragraph one that action creates.

Based on all of the foregoing analysis and only after carefully considering the relevant language of the 1984 National Agreement and the arguments and evidence adduced by the parties, the Arbitrator has determined that the Union has proven by a preponderance of the evidence

¹⁶ See: *Coalite, Inc. and UMWA District 30, Local Union No. 2225, Case No. 78-20-81-510* (June 10, 1981) Jack Clarke, Arbitrator.

that the Company's challenged licensing out agreements with KTK, Inc. and Highwire, Inc. were entered into for the purpose of avoiding the application of the National Agreement. Accordingly, in the Award below, the instant grievance will be sustained.

For the record, the Arbitrator makes the following observations:

1. All of the several prior panel arbitrator awards adduced by the parties that appear to be on point with regard to the Article IA, Section (h)(1), paragraph one issue before the Arbitrator can be distinguished on their facts from the instant case in one or more of three ways:
 - (i) the lessee/licensee operators were signatories of the National Agreement; or
 - (ii) the lessee/licensee operators either sold the coal they mined or at least there was no evidence the lessee/licensee operators sold all of the coal they produced to the licensor primary Employer; or
 - (iii) the primary Employer licensed leased both its coal lands (in their entirety) and its preparation plant facilities to the lessee/licensee operator.
2. The decisions of the United States Court of Appeals for the Fourth Circuit in *Clinchfield Coal Company, et al. vs. District 28, United Mine Workers of America and Local Union No. 1452*, 720 F.2d 1365 (4th Cir. 1983) and *Clinchfield Coal Company, et al., v. District 28, United Mine Workers of America, Local Union No. 1098*, 736 F.2d 998 (4th Cir. 1984) present no barrier to the Arbitrator's Award in this matter. The undersigned has carefully considered the relevant provisions of the 1984 National Agreement and fully addressed the arguments and evidence adduced by both parties in order to ensure that his analysis and

Award draw their essence from the controlling provisions of the 1984 National Agreement.

3. The question of whether Article IA, Section (h)(1), paragraph one as applied by the Arbitrator in resolution of this dispute violates Section 8(a) of the NLRA must be answered by the National Labor Relations Board. That issue was not argued by the parties and the Arbitrator has not decided it. Nevertheless, the undersigned would note that his analysis and Award should be not read as extending the Article IA, Section (h)(1), paragraph 1 proscription to the labor relations functions of the licensee operators involved here (KTK, Inc. and Highwire, Inc.) or as barring Enoxy Coal, Inc. from doing business with either operator. Rather, the Arbitrator has interpreted that provision of the 1984 National Agreement as having been formulated and adopted in order to protect the employees of the primary Employer in this dispute by preventing it from utilizing the licensing out device as a means for avoiding the application of the National Agreement.
4. The Award of Arbitrator Hobgood in Case No. 84-12-86-290 is not relevant to determining the proper outcome of the present controversy. It does not involve an Employer action in leasing or licensing out its coal lands. Therefore the analysis of Arbitrator Hobgood and the subsequent order of the United States District Court for the Southern District of Illinois in *Amax Coal Company v. International Union, UMWA, et al.*, Civil Action No. 87-4008 (February 23, 1987) vacating that Award is irrelevant here.

VII. AWARD

In light of the above analysis, findings and conclusions, the instant grievance is sustained. After careful consideration the Arbitrator has determined that the appropriate

remedy for the Company's violation of Article IA, Section (h)(1), paragraph one is an arbitral order directing the company to terminate its Mining Contracts with KTK, Inc., and Highwire, Inc. forthwith and under no circumstances not later than July 1, 1987. That remedy is hereby directed.

May 25, 1987
Bloomington, Indiana

/s/ Stephen L. Hayford
Stephen L. Hayford, Arbitrator

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 88-6122

AGIPCOAL, U.S.A., INC.,

Plaintiff-Appellee,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; DISTRICT 30, UNITED MINE WORKERS OF AMERICA; LOCAL UNION NO. 1827, UNITED MINE WORKERS OF AMERICA,

Defendants-Appellants

FILED

AUG 9 1989

LEONARD GREEN, Clerk

ORDER

BEFORE: NELSON and BOGGS, Circuit Judges; and ALDRICH*, United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

* Hon. Ann Aldrich sitting by designation from the Northern District of Ohio

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Jr
Leonard Green, Clerk

